CALCUTTA HIGH COURT

Ratan Kumari Tholia

Vs.

Sunder Lal Tholia

Suit No. 969 of 1958

(P.C. Mallick, J.)

17.06.1959

JUDGMENT

P.C. Mallick, J.

1. This is a suit for partition of properties belonging to a Mitakshara Coparcenary. The plaintiff's husband was a member of this coparcenary. The husband died in 1944. By an order passed by G.K. Mitter, J. the two following issues were set down for trial as preliminary issues.

1. (a)(i) Has the plaintiff any share in the immovable properties ?
(ii) Has the plaintiff any share in the movable properties ?
(b) If so, what is the nature and extent of such share ?
2. Has the plaintiff any right to claim maintenance ? If so, out of what estate ?

2. Mr. Choudhury appearing for the plaintiff suggested that the hearing of the second issue be deferred and the first issue be decided first. Mr. Deb appearing for the defendants suggested that over and above the two above issues, let a third issue be framed and tried as to whether the court has jurisdiction to try this suit Ultimately it was agreed by the parties that the issue No. 1 be tried first and the second issue as also the issue as to jurisdiction should be tried after the determination of issue No. 1.

3. Mr. Deb submitted that parties will only be at issue if the parties are domiciled in Jaipur which till 1947 was a foreign state. If not the position would be different and the issue No. I would not arise for decision in this suit. He, therefore, called upon the plaintiff to admit file fact that the parties had Jaipur domicile and that this admission may be recorded. Mr. Choudhury submitted that he should not be called upon to make the admission at this stage and suggested that this issue be tried on the footing that the parties had Jaipur domicile. Mr. Deb accepted this suggestion. I am therefore, now deciding issue No. I only and I am deciding this issue on the footing that parties had Jaipur domicile. If the parties do not agree Inter that they were and are of Jaipur domicile, that issue will have to be decided later.

4. The Tholia family appear to be a very prosperous family and the Schedule of Properties - movable, immovable and businesses - is a very impressive schedule. The immovable properties consist of fifteen items of properties at Jaipur, one at Bombay, one at Mussourie and three at Calcutta. The movables consist of gold ornaments as also ornaments set with previous stones and pearls, gold bars and gold and silver wares. It is alleged that there are accounts in five banks, one of which account is with the Chartered Bank, New Delhi. The other accounts are all with the banks at Jaipur. There are three businesses, of them two Baijilal Tholia and Sons with its branches and Tarachand Vijay Kumara are carried on at Jaipur. The third business Shanti Vijay is carried on at Delhi. To sum up, most of the immovable properties, business and movables are at Jaipur but there are substantial properties - movable, immovable and businesses outside Jaipur and within territories formerly known as British India.

5. The plaintiff's husband Harakchand was admittedly a member of the coparcenary. He died in November 1944. The question is whether the widow of a coparcener who has died in 1944 can claim a share in the coparcenary property and a partition. Apart from the Statutes, viz., The Hindu Women's Rig it to Property Act (Act XVIII) of 1937. The Hindu Women's Right to Property Act (Act XXXVIII) passed by the Jaipur Legislature and the Hindu Succession Act (Act XXX) of 1956 the plaintiff as a widow of a deceased coparcener can hardly claim' apart from maintenance any title or interest in the coparcenary property. This can and indeed has not been disputed. Mr. Choudhury conceded that if the Statutes do not cover the case, his client will be out of court. It is equally clear that if the Statutes apply and the plaintiff's case is covered by the Hindu Succession Act and the Hindu Women's Right to Property Act, then the plaintiff would succeed at least in part.

6. The case has been argued with remarkable ability and fairness on either side and I record my appreciation of the assistance rendered by the learned counsel on either side. The case is not covered by any clear authority of any of the courts in India and hence the assistance rendered by the learned counsel is all the more welcome and useful to me. I feel it my duty to acknowledge the assistance rendered by the Bar in this case.

7. The law of intestate and testamentary succession in British India is embodied in the Indian Succession Act. Part V of the Act deals with in testate succession and Section 29 is the first section in that part which lays down the extent of its application. Sub-Section (1) expressly excludes the operation of the rules of intestate succession as embodied in Succession Act Part V to Hindus, Mahomedans, Buddhists, Sikhs and Jains, Sub-Section (2) enacts : "Save as provided in sub-section (1) or any other law for the time being in force; the provisions of this Act shall constitute the law of British India in all cases of intestacy." In matter of intestate Succession therefore the Indian Succession Act which may be characterized as the lex loci expressly excludes amongst other the Hindus. The law regulating intestate succession of the properties left by a deceased Hindu is to be found elsewhere. It cannot be said however that the Indian Succession Act which is the lex loci of British India not only excludes the operation of the rules of intestate succession to the property of the class excluded in the section but also affirmatively lays down that it is to be governed by their personal law. The language used in the section does not warrant this proposition. In my view, on this point the Indian Succession Act is only negative and not positive.

8. The ultimate source of Hindu law are the Smritis. Subsequent commentators put their own

gloss on these ancient texts. These, subsequent commentaries were accepted as authoritative in some parts of India only and not the whole of India. In this way there came into existence the different schools of Hindu Law Dayabhaga and Mitakshara. The Dayabhaga is of supreme authority in Bengal and Assam and Mitakshara of supreme authority in the rest of India. With the passage of time the Mitakshara law was subdivided into four Schools, viz., Benares School, Mithila School, Maharastra or Bombay School and Dravida or Madras School. Each of these Schools was held as authoritative by people of different localities as their name indicates. That is how the different people of India had different rules of succession with respect to their property according to the different Schools of Hindu Law. It is necessary, however, to guard against a misconception. Though the different Schools of Hindu Law prevail in different parts of India, these laws ought not be considered the lex loci or local laws, These laws are personal law of the Hindus. The law has been well stated by Maine and approved by the Judicial Committee in the case of *Balwant Rao v. Baji Rao*[1], in the following words :

> "Now it is absolutely settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. It is well put by Mr. Maine in para 48 of his Hindu Law, where ha says : 'Prima facie any Hindu residing in a particullar province of India is held to be subject to the particular doctrine of Hindu law recognised in that province ..... But this law is not merely a local law. It becomes the personal law and part of the status of every family which is governed by it; consequently, where any such family migrates to another province governed by another law. it carries its own law with it. Ample authority for this statement may be found in *Rutcheputty Dutt Jki v. Rajunder Narain Rai*[2], in *Soorendranath Roy v. Heeramonee Burmoneah*[3], and in more recent times in *Parbati Kumari Debi v. Jagadis Chunder*[4],

This personal law of the Hindus has been amplified and developed by Judicial decisions and recently modified by legislation. The most important example of legislative interference with this personal law is the passing of the Hindu Women's Right to Property Act of 1937 and the Hindu Succession Act of 1956 with which we are concerned in this case.

9. The plaintiffs claim to inherit her husband's share in the coparcenary property has first been made under Section 8 of the Hindu Succession Act, 1956. This Act came into force on 17-6-1956. It is an Act to "amend and codify the law relating to intestate succession amongst the Hindus." It extends to the whole of India except the State of Jammu and Kashmir (Section 1). It applies to any person who is a Hindu by religion in any of its forms or developments but not to a Muslim, Christian, Parsi or Jew by religion (S. 2). Section 5 expressly lays down that it excludes the properties by which the Indian Succession Act applies. Section 6 deals with the devolution of coparcenary properties in general. Section 7 deals with devolution of coparcenary properties under Kamudri School of Mitakshara Law. Section 8 lays down the general rule of intestate succession in the following terms :

[1]47 Ind App 213 at page 219 : (AIR 1921 PC 59 at p. 60)
[2]2 MOD. Ind App 132 (PC)
[3]12 Moo. Ind App 81 (P.C)
[4]29 Ind App 82 (P.C)

> "(8) The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter -

(a) firstly, upon the heirs, being the relatives specified in class I, of the Schedule;
(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
(d), lastly, if there is no agnate, then upon the cognates of the deceased."

10. Mr. Choudhury contended that though the Act came into force in 17-6-1956, nevertheless, the rule of devolution laid down in Section 8 applies even though the death took place before the Act came into force of the person whose property is She subject matter of devolution or succession. The expression 'dying intestate' in the statute are mere description of the status of the deceased and have no reference to the time of death of the Hindu male. In the case of *Hiralal Roy Choudhuri v. Kumund Behary Roy*[5], I took the same view. In that case the last male owner died long before the Hindu Succession Act came into force and at the date of the Act coming into force his property was inherited by his widow in Hindu Women's right. The widow died after the Act came into force and the question arose whether Section 8, of the Hindu Succession Act would apply. I held that the section would apply as the succession to the estate of the last male holder opened on the death of the widow when the Act came into force. the wordy 'dying intestate' in the section is nothing Boore than the description of the status of the deceased and has not reference to the time of death of the deceased. The Appeal Court consisting of Chakravartti, C.J. and Lahiri, J. approved of the view I expressed in the above case in the case of *Bepinbehari v. Lukshmasona Dassi*[6], I accept this argument of Mr. Choudhury that the death of the plaintiff's husband prior to passing of the Act does not prevent the application of Section 8 of the Hindu Succession Act in the instant case.

11. The next point to be considered is whether the operation of the section is excluded by reason of the fact that the subject matter of this litigation is coparcenary property and the husband of the plaintiff who was admittedly a coparcener died before the Act came into force. It is contended by Mr. Deb learned counsel appearing for the defendant, that on the death of the coparcener before the Act came into force, his interest in the coparcenary property is extinguished and there is nothing to be inherited by the heirs under Section 8 of the Act. Mr. Deb submitted that devolution of a co-parcenary property has been laid down in Sections 6 and 7 of the Act and Section 8 has nothing to do with the devolution of coparcenary property. Section 6 of the Act lays down the rules of devolution of coparcenary property and reads as follows :

"(6) When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act;
Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara

[5] AIR 1957 Cal 571
[6] AIR 1959 Cal127

coparcenary property shall devolve by testamentary or intestate succession, as the case

may be, under this Act and not by survivorship."

He submits that under Section 6 the rule of devolution in respect to coparcenary has been altered to this extent that if a "coparcenary dies after the commencement of this Act' his interest in the coparcenary would be inherited by his heirs. Prior to the Act, on the death of the coparcener, the rule of survivorship determined the devolution and the coparcener's interest in the coparcenary property was extinguished on his death and could not be inherited by his heirs. The law has been altered to this extent, that the female heirs and heirs through female of a deceased coparcener would inherit if and only if the coparcener died after the Act came into force as the opening clause in Section 6 indicates. If, however, death of the coparcener has taken place prior to the Act's coming into force, the position of the female heir or heirs through female in the matter of devolution of coparcenary property remained as before. In other words, they acquire no interest whatsoever. To construe Sections 6 to 8 otherwise, would be not only straining the language of the sections but would lead to this absurdity that the female heirs and heirs through the females of all deceased coparceners who dies in the long past would become heirs resulting in complete chaos in the ownership of co-parcenary properties. The Legislature could not have intended to create this chaos in the ownership of a coparcenary property and could not have intended so violent a disturbance in the vested rights of the coparceners.

12. Mr. Choudhury has emphasised that Section 8 of the Act lays down the general rule of devolution in. the case of Hindu Males with respect to all properties including coparcenary properties. The word 'property' referred to in Section 8 of the Act must be given the plain meaning, 'Interest in the coparcenary property' the phrase used in Sections 6 and 7 of the Act is also 'property' and there is no reason why the word 'property' in Section 8 should be given an artificial and restricted meaning. From! this difference in the language used in Sections 6 and 7 on the one hand and Section 8 on the other, it cannot be inferred that Sections 6 and 7 deals with a subject matter which is different from the subject matter dealt with in Section 8. I agree with Mr. Choudhury that the difference in the language used does not warrant an inference that whereas Sections 6 and 7 deal with coparcenary property Section 8 deals with property other than coparcenary property. By itself such difference would not entitle the court to give a restricted meaning to the word "property" in Section 8 of the Act and limit its operation to properties other than co-parcenary property. Mr. Choudhury then argues that Section 8 being the general rule of devolution of all properties including coparcenary properties, Sections 6 and 7 should be taken to be nothing more than the exceptions to this general rule. Reading Sections 6 and 7 as exceptions, it must be held that these sections only deal with interest in Mitakshara coparcenary properties, when a Hindu male dies after the commencement of this Act. The Sections 6 and 7 in terms do not deal with the devolution of interest in coparcenary property if the male Hindu died before the commencement of this Act. Hence the devolution of coparcenary property of a Hindu male who died before the commencement of the Act is regulated by the general Section 8. In other words, if a Hindu died before the commencement of this Act, the rule of devolution under Section 8 would be the same as determines the devolution of non-coparcenary properties viz., female heir or heirs through females would inherit. If however the male Hindu dies after the commencement of this Act, the same result would follow under Sections 6 and 7 of the Act. According to this construction, Sections 6 and 7 seem to be wholly redundant. If the Legislature intended that in any event the Hindu female would inherit to coparcenary property and Section 8 covered the cases whether death took place before or after the Act came into force, there was no point in

enacting Sections 6 and 7 of the Act restricting the right to inherit only in the event of the Hindu dying intestate after the commencement of the Act.

13. The fallacy in this reasoning is the assumption that after the death of a coparcener before the Act came into force, any interest in the coparcenary subsisted to the dead coparcener, to be inherited by His heirs. This ignores the funda" mental rule of Mitakshara law that on the death of a Hindu coparcener his interest in the coparcenary property is extinguished and the ownership in the entire coparcenary property devolved on the remaining coparceners according to the rule of suvivorship. This is the law of survivorship peculiar to Mitakshara coparcenary. That law was effective upto the passing of the Hindu Succession Act, 1956. At the date of the passing of the Act therefore when a coparcener died prior to the date, his interest has already extinguished and there was nothing to be inherited by the heirs. This, in my judgment, is the fallacy of the argument contended for by Mr. Choudhury.

14. It is contended that Section 8 is retrospective in its effect. Reliance is placed on the cases cited in support of the argument that the Rule of devolution as laid down by Section 8 has no reference to the time of death of the person. "Dying intestate" in the section must be and indeed has been construed as a description of the status of the man and has no reference to the time of death of the person. This is undoubtedly true. But, in my judgment, it is neither here nor there. The point of importance is not the time of death but the time of devolution. In order that Section 8 may apply the time of devolution must he after the date of the Act coming into force, not the date of death. A man may die prior to the date of the Act but succession to his estate may open after the date if in between one or more female heirs intervened, as in the case of AIR 1957 Calcutta 571 noticed before. This, however, does not mean that the Section 8 has been given retrospective operation. The rule of devolution as laid down in Section 8 of the Act will only apply if succession opens after the Act came into force, which normally takes place at the death of a male Hindu but not necessarily.

15. I think that the construction contended for by Mr. Deb is the correct construction. Sections 6 and 7 deal with the devolution of co-parcenary properties and Section 8 deals with the devolution of all properties other than co-parcenary properties even though the word 'property' used in Section 8 is wide enough to include interest in coparcenary properties.' The reason why Section 8 does not come into play with reference to coparcenary property in case of death before the Act came into force is, that on the death of the coparcener, not interest subsisted to the dead coparcener to be inherited by his heirs. Let me now consider how far the plaintiff's claim can be sustained by Hindu Women's Right to Property Act passed by the Jaipur Legislature in 1947 or by the same Act passed previously by the Indian Legislature in 1937. The relevant sections of the Act are set out hereunder. Hindu Women's Right to Property Act :

> 3.(2) When a Hindu governed by any school of Hindu Law other than the Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-Section (3), have in the property the same interest as he himself had.
> (3) Any interest devolving on a Hindu widow under the provisions of this section shall be limited interest blown as a Hindu Women's Estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends on a single heir or to any property to which the Indian Succession Act, 1925, applies.

4. Savings : Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

16. The plaintiffs husband died in 1944, that is, subsequent to the 1937 Act but prior to the Jaipur Act which came into force in 1947. Further, as the Act has now emerged after the Adaptation Order it extends to the whole of India except Part B States. In this State of fact what is the right of the plaintiff a widow of a coparcener in the coparcenary property - the coparcener having died in 1944 prior to the passing of the Jaipur Act but subsequent to the passing of the 1937 Act ? This is the point to be considered in this case.

17. Mr. Deb contended that Section 1(2) of the, 1937 Act limits the applicability of the Act 'to the whole of India excepting Part B States.' Jaipur is, admittedly, a Part B State, Hence this Act is not applicable to the instant case because the family had and has Jaipur domicile. It is submitted that the 1937 Act does not apply to the Jaipur Hindus and under the Mitakshara Law applicable to the Jaipur Hindus the widow does not acquire any interest in the Mitakshara coparcenary properties of which her husband was a coparcener. After the death of her husband she has only the right of maintenance and no other interest. It is submitted this law will govern the case and the plaintiff is not entitled to claim any interest in the coparcenary property. It is contended on behalf of the plaintiff that Section 3 (2) of the Act covers the case and the Hindu widow gets in the coparcenary property the same interest as the deceased coparcener had whether the coparcener had died before or after the Act had come into force. The words used in the section "dies intestate" or 'dies' has no reference to the time of death but only is a description of the status of the deceased Hindu. It is submitted that a distinction is made in the Act itself between 'property' and 'interest in Hindu joint family property. In Section 3 (1) the words used are 'property' or 'separate property' while in Section 3(2) the words used are 'interest in Hindu joint family property' even though 'interest in Hindu joint family property' is 'property'. It is urged that the Legislature deliberately made a distinction between the two and while construing Section 4 of the Act this distinction should be kept in mind. Section 4 of the Act reads as follows :

(4) "Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act."

18. In the light of distinction made in the wording of Sub-Sections (1) and (2) of Section 3 of the Act, it is contended that the saving Section 4 is only applicable to Sub-Section 3 (1) and not to Sub-Section 3(2) of the Act. If the legislature intended that both Sub-Sections (1) and (2) of Section 3 would not be effective unless the Hindu died intestate after the commencement of this Act, the legislature would not have used 'interest in Hindu Joint Family Property" but "property" in sub-Section 3(2) as it has used in sub-Section 3(1) of the Act It is therefore submitted that while the widow gets the same interest as her husband's in the separate properties left by him under Mitakshara Law and all properties left by him under Dayabhaga Law only if the Husband dies intestate after the commencement of this Act, the widow gets the same interest as her husband's in the coparcenary property when the husband dies intestate whether before or after the

commencement of this Act. In other words while Sub-Section 3(1) is prospective only, sub-Section 3(2) is retrospective in its operation. This construction was approved of by the majority decision in the case of *Radhi Bewa v. Bhagwan Sahu* decided by a Special Bench of three Judges of the Orissa High Court and reported in AIR 1951 Orissa 378. The majority consisting of Roy, C.J. and Narasingham, J. held that "taking into consideration the rule of drafting regarding the use of tense and mood and the implication arising out of the language used to Sub-Sections (1) and (2) of Section 3 read with Section 4 of the Act, it seems clear that there is nothing in sub-section (2) of Section 3 to limit its application to the case of a Hindu who dies after the commencement of the Act." In their Lordships' view the benefits of sub-section (2) should not be denied to persons who became widows prior to the commencement of this Act so long as the interest which their husbands had in joint family property at the time of their death had not vested in any other individual. The qualification referred to by their Lordships and as stated above indicate the fallacy implicit in this reasoning. On the death of the husband prior to the Act, the coparcenary property had vested in the remaining coparceners by the law of survivorship. No interest in the coparcenary property of the deceased coparcener can enure for the benefit' of the widow without divesting the surviving coparcener of the husband's interest. Jagannath Das, J., the third Judge in his dissenting judgment disagreed with the majority view and contended that the view was untenable. This decision of the Orissa Special Bench is not a binding decision on me and I have the option to accept either the majority or the minority view. In my view, the dissenting judgment of Jagannalh Das, J. correctly interprets the Statute and should be accepted. Mr. Deb has drawn my attention to the fact that a Full Bench of the Orissa High Court has in the case of *Moni Dei v. Hadibandhu Patra* [7] has since overruled the majority decision set out above.

19. In the earlier part of this judgment while discussing the provisions of Sections 6 and 8 of the Hindu Succession Act I indicated that the word 'property' in Section 8 includes 'interest in Hindu joint family property' - referred to in Section 6 of the Act. The phrase in Section 6 is used because it correctly describes the nature of coparcenary interest and not because the Legislature intended to distinguish it from other properties dealt with in Section 8. In the instant case also I do not think that the Legislature by using the word 'property' in Section 3 (1) and interest in Hindu joint family property in Section 3 (2) intended that whereas the operation of Section 3 (1) would be prospective, the operation of Section 3 (2) would be retrospective and for that purpose in the saving Section 4 of the Act it has used the word 'properly' and no 'interest in Hindu joint family property'. I hold that in order that the widow may acquire interest in coparcenary property under the Hindu Women's Right to Property Act, the male Hindu or the husband must die intestate after and not before the commencement of this Act. The Jaipur Act having come into force in 1947 long after 1944 when the plaintiff's husband died, does not therefore enure to the benefit of the plaintiff.

[7] AIR 1955 Ori 73

20. Coming now to the Hindu Women's Right to Property Act passed by the Indian Legislature in 1987; Section 1 (2) of the Act provides that it extends to the whole of British India including British Baluchistan and Santal Parganas and excluding Burma. It did not include Jaipur which was a Native State then. After India became a Republic in 1950 and the former Native States were integrated to the Indian Union Jaipur was included in the List of Part B States. By the Adaptation of Laws Order, 1950, Section 1 (2) of the Hindu Women's Right to Property Act 1937 has been redrafted as follows : "It extends to the whole of India except Part B States." It is contended by Mr. Deb that Jaipur being a "Part B State" now and in any event being a Native State and not a part of British India when the Act was enacted in 1937, this Act does not apply to

the instant case. The argument is that inasmuch as the Hindu male in the instant case was of Jaipur domicil i.e. non-Indian domicil, this Act would not apply. It is argued that it is a law of succession and such law follows the domicil of the deceased. Alternatively. It is argued that this Act does nothing more than altering the personal law of Hindus in matters of succession and it is urged that the law applicable would be the Hindu Law is prevailing in Jaipur and not as prevailing in British India. Jaipur is excluded from the operation of the Act and the plaintiff acquires no right under the Act. Mitakshara Law of survivorship unaffected by the Hindu Women's Right to Property Act, 1937 will govern the case and the plaintiff must be non-suited.

21. The Hindu Women's Right to Property Act, 1937 does not purport to be an Act laying down the law as to succession to the property of a male Hindu. It purports to amend the Hindu Law "to give better rights to women in respect to property." It is not, like Hindu Succession Act, 1956, a complete Code regulating the law of succession to the property of a deceased Hindu male or female. It is not even a limited law of succession for a Hindu like the Hindu Law of Inheritance (Amendment) Act, 1929. It is significant that throughout the Act of 1937, not once the word 'heir' has been used with reference to the widow of the deceased who is the most important beneficiary under the Act. The fact that under the Act the Hindu widow gets right in her husband's property on the death of her husband does not make the law a law of inheritance, though superficially it would appear to be so. In the case of *Natarajan Chettiar v. Parurnal Animal decided by the Madras High Court and reported in*[8] Horwill, J. observed as follows :

> "The widow does not obtain the right given under Section 3 by survivorship. It does not, how" ever, follow that because the widow does not obtain her right by the right of survivorship, that she must obtain it by inheritance. The effect of Section 3 clauses (2) and (3) may be regarded as a survival of the husband's persona in his wife, giving her the same rights as her husband had except that she can alienate only under certain circumstances."

It was a case of a pronote and it was held that as the window does not inherit her right, no Succession Certificate is necessary to entitle her to sue on a pronote, The High Courts of Nagpur, Patna, Madhya Pradesh and certain Judges of the Madras High Court, however, are apt to think that the widow under the 1937 Act gets the property by inheritance (see *Jadao Bai v Puran Mal*[9]*, Jugal Kisore v. Wardhasa, Padamsa Lal*[10] *Mt. Rajendra Bati v. Mungalal*[11]*, Siveshwar v. Harnarain Mal, kadar Nath v. Radha Shyam*[13]*,*

[8] AIR 1943 Mad 246 [10] AIR 1955 Nag 166 [12] AIR 1945 Pat 116
[9] AIR 1944 Nag 243 [11] AIR 1953 Pat 129 [13] AIR1953 Pat 81

Bhagabati v. Bhaiyalal[14]*, Radha Ammal v. Income-tax Commissioner, Madras*[15]*,* A strong Division Bench of the Bombay High Court consisting of Bhagwati and Dixit, JJ. in the case of *Nagappa Narayan v. Mukambe*[16]*,* held in a well-considered judgment that the law has been correctly stated by Horwill, J. in the case noted above. The Division Bench disagreed with the Nagpur, Patna and Madhya Pradesh view that the widow gets the property under Section 3 of the Act as and by way of inheritance. The view of Horwill, J. has also been supported by a Division Bench of the Madras High Court consisting of Mack and Krishnaswamy Nayudu, JJ. in the case of *Rathina Sabapathi Pillai v. Saraswati Ammal*[17]*,* In agreement with the view taken by Horwill, J. and approved by the Bombay and Madras High Court's as stated above, I hold that the interest the widow gets in her husband's property under Section 3 of the Act is neither by survivorship nor by inheritance. It is a special kind of interest which is the creation of statute. I respectfully

disagree with the contrary views taken by Nagpur, Patna and Madhya Pradesh High Courts. The Federal Court had to consider Sec. (3) of the Act in the case of *Umayal Achi v. Lakshmi Achi*[18], In this case a very wealthy Hindu male having his residence and domicile in Madras died leaving immense properties, movable and immovable, within and beyond British India. He left him surviving no male heir but only two widows and a widow by a pre-deceased son. The widow of the pre-deceased son instituted a suit for administration and partition, impleading, amongst others, the too widows of the deceased as defendants. Prior to his death, the male Hindu created certain trusts with respect to his properties. The trustees were also impleaded as defendants. The case made by the son's widow was that the properties in the hands of the last male Hindu were separate properties within the meaning of Section 3 (1) of the Hindu Women's Right to Property Act and the plaintiff inherited a half share as the son's widow under the proviso to that section. The suit was contested, inter alia, on the ground (1) that the Act was ultra vires (2) that the properties were coparcenary properties and that though after the death of the son, the father was the only coparcener, the properties were nevertheless coparcenary properties and not "separate properties" in the hand of the last coparcener within the meaning of Section 3 (1). of the Act. In consequence. Section 3 (1) of the Act does not apply and the plaintiff acquired no title under the first proviso to the sub-section. The trial court decreed the suit on the finding that the Act is not ultra vires, that the coparcenary property in the hand of the last surviving coparcener was separate property within the meaning of Section 3 of the Act, The decree declared half share of the plaintiff in all properties, movable and immovable within British India and movable properties beyond British India. In appeal, the Madras High Court affirmed the decree, subject to this variation that the movables outside British India were left out and the decree granted was confined to all properties within British India. Both parties appealed to the Federal Court. The Federal Court held that the Act is not ultra vires, that the coparcenary properties in the hand of the last living coparcener were not separate properties within the meaning of the Act and the decree was set aside. The Court, however, did not dismiss the suit but passed a new preliminary decree declaring that the plaintiff had half share in the separate property, that is, other than coparcenary property of the deceased and that she had also a right of maintenance out of the coparcenary properties. The main judgment was delivered by Varadachariar, J. with which Spens, C.J., concurred. Zafrulla Khan, the third Judge, held that the Act was ultra vires but on all other points he expressed complete agreement with the view of Varadnchariar, J. The court expressed the view that the predeceased

[14] AIR 1957 Mad Pra 29
[15] AIR 1950 Mad 538
[16] AIR 1951 Bom 309 181945 FCR 1
[17] AIR 1954 Mad 307

son's widow get her share under Section 3 (1) first proviso as and by way of inheritance and applying the principle that succession to movables is governed by the domicile of the deceased held, disagreeing with the views expressed by the Madras High Court, that a decree could be passed under the Act not merely with respect to property within British India but also outside British India. At page 32 (of FCR) of the Report Varadachariar, J. observed as follows :

> "The result of that exclusion would no doubt be that a Hindu domiciled in Burma would not be governed by the Act. But that is different from saying that a Hindu domiciled in British India would be governed by the Act only in respect of properties situate within British India. The position as regards immovable property is different, because, according to the well-established rule or international law, the law of domicile does not furnish the

rule of succession to immovable property."

The passage does suggest that domicile of the deceased has important bearing on the right of the son's widow and that the Act is an act of Inheritance or Succession. It is true that the son's Widow's right to get the property of the father-in-law has been treated by all concerned as andby way of inheritance. On that footing Sir Brojendra Lal Mitter made his submission on behalf of the widow; who was appellant as also the other eminent counsel who appeared in the case. It is also on this footing that the Federal Court dealt with the case, as will appear from the observation made by Varadachariar, J. at page 30 (of FCR) .

> "It has not been disputed that the distribution of the distributable residue of the movables whereever they may be situate, will ordinarily be governed by the law of domicile of the owner at the time of his death. (Dicey Conflict of Law, Rule 192). It can make no difference for this purpose whether the law of domicile rests on Common Law or on Statute Law."

Rule 192 (in the 7th Edition Rule 113) relates to intestate succession in respect to movables. Following this Rule, it is held in the cited case that inasmuch as Arunnamalan Chettiar, the proprietor, having his domicile in British India at the time of his death, the son's widow would inherit the movables situate beyond British India under proviso to Section 3 (1) of the Act. On a parity of reasoning the plaintiff as the widow of Hindu having his Domicile at Jaipur will not inherit the estate of her husband - in any event at least to other than immovable properties.

22. So far as the predeceased son's widow is concerned, the Act can be treated as an Act of Succession or Inheritance and the principles of private international law will apply, namely, that domicile will determine which Law of Succession would govern the case. The same reason, however, will not apply to the case of a widow, because, as indicated above, the widow does not get under Section 3 of the Act as and by way of inheritance. So far as the widow is concerned, the Act is not an Act of Succession and the Federal Court case is therefore not a proper authority in support of the proposition that Jaipur domicile will prevent the widow from acquiring any right under the Hindu Women's Right to Property Act 1937. In my judgment, there is no principle of private international law or Municipal Law that requires me to hold that the right of the widow under Section 3 of the Hindu Women's Right to Property Act would be governed by the domicile of the deceased. The decision of the Federal Court, as indicated above, is no authority for this proposition. No other decision has been cited which directs that the husband's domicile would determine the widow's right in movables in such cases. The question involved in this case would be a case in volving conflict of laws, if it is a question of inheritance or succession to property by the widow to her deceased husband. In. such cases the question posed is - would the Law of Succession prevailing in Jaipur, or the Law of Succession prevailing in British India would govern the case ? It is only in this context, that domicile becomes not only relevant but very material in determining the issue. To attract the principles or private international law, it may also be said that in the instant case there is a conflict viz., between Hindu Law as prevailing in Jaipur and Hindu Law prevailing in British India affecting the right of a Hindu widow in her husband's property. At Jaipur the law was the Sastric Mitakshara Law whereunder the widow apart from having a right of maintenance had no other right. In British India however the Hindu Law has been modified by the Act of 1937 whereby the Hindu widow

acquires substantial interest in her husband's properties. Migration cases have been referred to in argument. Migration cases however would be of little assistance. Hindu Law recognises the existence of difference in the personal laws of the different Hindus and the Courts have to consider in each case what personal law is applicable. This is very clearly brought out in the judgments in migration cases, one of which has been cited in the earlier part of this judgment. The principles in migration cases "however would not be of any use in the present discussion. In the instant case, there is the impact of legislation. The legislature has given more extended rights to the widow than the Shastric or Common Law gave and to the extent that there is legislation personal or Sastric law is superseded. The Courts in India are not entitled to ignore the legislation affecting the rights of a Hindu widow and apply the Shastric Mitakshara Law unaffected by legislation, on the ground that the deceased husband was a resident of Jaipur and was governed there by the Shastric Mitakshara Law, unless it is held, on the construction of the statute, that the Act is restricted in its operation and does not apply to the Hindus having residence and domicile in Jaipur. It is really not a case of conflict of two personal laws - one of Hindu Law as modified by legislation and one without such modification. The existence of two personal laws for the Hindus - one with and another without legislative modification - is logically and juridically untenable. The Hindu Women's Right to Property Act 1937 is the law of the land - Lex Loci. The question involved in this case is this and this only whether the legislation was intended to affect all properties, movable and immovable, within British India, no matter whether it belonged to a deceased Hindu who is a citizen or a foreigner, or whether he had Indian or non-Indian domicile. I have indicated the reasons why in my judgment the rule of domicile has no bearing on the question of construction. The language of the Act indicates that it gives an extended right to a Hindu widow in respect to all properties of her husband. Indian Legislature was competent to legislate in respect to all properties within the territory. It does not matter whether the properties belonged to a citizen or an alien. It excludes the operation of the Act to territories outside British India. Properties of a Hindu situate outside British India are not affected by the Act. But all properties, movable as well as immovable, situate within British India - no matter whether it belongs to a Hindu citizen or a Hindu alien and no matter whether the Hindu alien had Indian or non-Indian domicile - are affected by the provisions; of the Hindu Women's Right to Property Act, 1937. I see no reason to exclude either the movables or the immovables from the operation of the Act, either on the ground of non-Indian domicile of the husband or his politician status. Section 1(2) of the Act, which limits the operation of the Act, originally to British India except the stated territories and after adaptation to the whole of India except Part B States, does not mean that in order to attract the provisions of the statute the Hindu husband must reside and have his domicile within that territory. What the statute requires is that the property must situate within the specified territory and that the husband must be a Hindu at the time of his death. Whether he is a resident, within or outside or whether he had domicile within or outside at the time of his death is wholly immaterial and irrelevant for the purpose of determining the widow's right.

23. The widow under Section 3 (3) of the Hindu Women's Right to Property Act, 1937 shall get limited interest in the properties, left by her deceased husband. The plaintiff, therefore, on the death of her husband in 1944 got the interest of her husband in all the coparcenary properties with in India in Hindu Women's right. Under Section 14 of the Hindu Succession Act, 1956, she would acquire absolute title therein, provided the conditions laid down in Section 14 are satisfied. I was invited to decide Issue No. 1 as a preliminary issue only on a construction of the Hindu Women's Right to Property Act and the Hindu Succession Act and no evidence has been led on any question of fact. Whether the conditions laid down in Section 14 have been satisfied can only

be determined on evidence and the nature of right of the widow cannot, therefore, be determined at this stage.

24. I, therefore, answer Issue No. 1 as under
Issue No. 1 :

> (a)(i) The plaintiff has share in the immovable properties situate within the Indian Union, except those situate at Jaipur.
> (ii) The same answer with respect to movables and businesses.
> (b) Whether she acquired absolute title in the said properties can only be determined on the determination on evidence of the question that the conditions laid down in Section 14 of the Hindu Succession Act have been complied with or not.

This issue, therefore, cannot be answered at this stage.

25. Costs reserved.
Order accordingly.